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IN THE

Supreme Court of the United States

BILTMORE FOREST BROADCASTING FM, INC.,
PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the FCC immune from liability in any court for money damages for breach of commercial contracts it enters into in the course of, or ancillary to, licensing proceedings?

2. Is the FCC immune from claims under the 5th Amendment when its licensing activities result in what would normally be a compensable taking?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 14

APPENDIX

Circuit Court of Appeals Opinion 1a
Claims Court Order 19a
Order Denying Rehearing 58a
Relevant Provisions Involved 59a

TABLE OF AUTHORITIES

Page

CASES

BELL ATLANTIC TELEPHONE COMPANIES V. FCC, 24 F. 3D 1441 (D.C. CIR. 1994) 10, 11, 12
BILTMORE FOREST BROADCASTING FM, INC. V. FCC, 321 F. 3D. 155 (D.C. CIR. 2003) 3, 4
BILTMORE FOREST BROADCASTING FM, INC. V. FCC, 80 FED. CL. 322 (2008) 1, 5
BILTMORE FOREST BROADCASTING FM, INC. V. UNITED STATES, 540 U.S. 981 (2003) 4
BILTMORE FOREST BROADCASTING FM, INC. V. UNITED STATES, 555 F.3D 1375 (FED. CIR. 2009) 1, 5
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL V. FCC, 254 F. 3D 89 (D.C. CIR. 2001) 8, 10
CROWN COAT FRONT CO. V. UNITED STATES, 386 U.S. 503 (1966) 13
FOLDEN V. UNITED STATES, 379 F. 3D 1344 (FED. CIR.2004) 4, 5
FOLDEN V. UNITED STATES, 56 FED. CL. 43 (2003) 5
MALAT V. RIDDELL, 383 U.S. 569 (1996) 13
NORTHPOINT TECHNOLOGY, LLC V. FCC, 414 F. 3D 61 (D.C. CIR. 2005) 8, 12
SPECTRUM LEASING CORP. V. U.S., 764 F. 2D 891 (D.C. CIR. 1985) 8
TOILET GOODS ASSOCIATION V. GARDNER, 387 U.S. 158 (1967) 13
TRANSAMERICA ACCESS POLICY STUDY GROUP V. FERC, 225 F.3D 667 (D.C. CIR. 2000) 9, 11
WISCONSIN VALLEY IMPROVEMENT COMPANY V. FEDERAL ENERGY REGULATORY COMMISSION, 236 F.3D 738 (D.C. CIR. 2001) 8, 11

STATUTES

28 U.S.C. 1254(1) 1
47 U.S.C. 402(b) 3, 13, 14

REGULATIONS

47 C.F.R. Section 1.2105(b) (1998) 2
47 C.F.R. Section 73.5002 (1998) 2

OTHER AUTHORITIES

In re Nextwave Personal Communications, Inc., et al., Case No. 98 B 21529 9
Liberty Productions, L.P., 16 F.C.C.R. 12061(2001) 3
Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, 14 F.C.C.R. 10632 (1999) 2

Petitioner Biltmore Forest Broadcasting FM, Inc. ("Biltmore"), by its attorneys, hereby respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. p. 1) is reported at *Biltmore Forest Broadcasting FM, Inc. v. United States*, 555 F.3d 1375 (Fed. Cir. 2009). Its Order denying reconsideration en banc is found at *Biltmore Forest Broadcasting FM, Inc. v. United States*, Case No. 2008- 5055, April 20, 2009 (App. 58a). The Opinion of the Court of Federal Claims is reported at *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 80 Fed. Cl. 322 (2008). (App. 19a)

JURISDICTION

The judgment of the Court of Appeals was originally entered on February 10, 2009. Its order denying rehearing en banc was entered on April 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

The apparently conflicting statutes conferring jurisdiction on the Courts of Appeal for the District of Columbia Circuit and the Court of Federal Claims are 47 U.S.C. 402(b) and 28 U.S.C. 1491(a)(1), both of which are set out in the Appendix. (App.59a-60a)

STATEMENT

This case began more than two decades ago when Petitioner Biltmore and thirteen other applicants filed applications with the FCC for a new FM radio station for Biltmore Forest, NC. After a full administrative hearing and a decade of administrative twists and turns not here relevant, the FCC eventually auctioned the license at issue to a subset of the original applicants pursuant to the new auction authority that had just been granted to the FCC by Congress in 1997. The auction was conducted according to procedures adopted by the FCC in its rules and regulations, 47 C.F.R. Section 1.2105(b) (1998) and 47 C.F.R. Section 73.5002 (1998), and also according to procedures promulgated for this specific auction. *Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999*, 14 F.C.C.R. 10632 (1999). ("*Public Notice*"). Briefly, the rules for this auction expressly and repeatedly required that applicants proposing to participate in the auction must submit a certain certification regarding the media interests held by their family members by a specified date. Failure by an applicant to submit this certification (and other information required by the Public Notice) by that date would, the FCC stated, "result in dismissal of the application and inability to participate in the auction." *Public Notice*, supra, at Attachment B.

One of the prospective auction participants (Liberty Productions, L.P. ("Liberty") failed to submit the required certification by the specified deadline, but the FCC apparently overlooked the omission and

allowed Liberty to take part in the auction. (The FCC's rules prohibited other bidders from raising eligibility defects until the auction was over.) Eventually, the bidding came down to Biltmore and Liberty, the bidder who was presumptively ineligible to be participating. Biltmore therefore stopped bidding in the confidence that Liberty would be declared ineligible and Biltmore's last high bid would, under the published auction rules, be declared the highest qualified bid. The auction therefore ended with Biltmore as the second highest bidder. As soon as the auction was over, Biltmore timely pointed out its competitor's ineligibility.

To everyone's surprise, the FCC ruled that the mandatory requirements set forth in its rules and the Public Notice for the auction were actually mere "admonishments," and Liberty could correct the defect after the auction had ended. Liberty quickly did so, was declared the winner of the auction, and was awarded the radio license. *Liberty Productions, L.P.*, 16 F.C.C.R. 12061(2001). Biltmore timely appealed the FCC's administrative action awarding the license to Liberty to the D.C. Circuit, as required by 47 U.S.C. 402(b). Under that section of the Communications Act, only the D.C. Circuit has jurisdiction to hear appeals from FCC licensing actions. Biltmore argued that the FCC's decision was contrary to its own regulations and procedures and therefore violated the Administrative Procedures Act. It asked the court to reverse the FCC and direct that the license be awarded to it. The D.C. Circuit ruled against Biltmore, applying the usual obligatory deference to the FCC's interpretation of its own regulation. *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F. 3d. 155 (D.C. Cir. 2003). The court did

not rule that the FCC had correctly interpreted the auction rules, but only that its interpretation was not plainly erroneous or inconsistent wit the regulations and therefore would be allowed to stand. *Ibid* at 160 - 161. Biltmore sought review in this Court on the grounds that the customary deference due to an administrative agency was unwarranted in a situation like this where the agency stood to gain an additional $1.7 million by ignoring the express requirement of its auction rules. This Court denied the petition for certiorari. *Biltmore Forest Broadcasting FM, Inc. v. United States*, 540 U.S. 981 (2003).

Biltmore's quest to receive the Biltmore Forest radio license was over, but the issue of whether the FCC was nevertheless liable to Biltmore for damages for its beach of the auction contract had just begun. Biltmore timely filed a complaint in the Court of Federal Claims ("Claims Court") alleging that the FCC had breached the contract formed by the auction process. No contract claim had been raised with either the FCC (one of the parties to the contract) or the D.C. Circuit, since that court has no jurisdiction to award money damages to claimants against the United States. The Claims Court dismissed Biltmore's claim by summary judgment, citing as binding the Federal Circuit precedent of *Folden v. United States*, 379 F. 3d 1344 (Fed. Cir.2004). In *Folden*, an FCC applicant for a license to be awarded by lottery brought suit in the Claims Court when the FCC decided not to hold a lottery, and simply dismissed the applicants. The aggrieved applicants alleged breach of contract by the FCC. The Claims Court ruled that there was no contract, but that even if there had been, the Claims Court had no jurisdiction over such a claim because the

D.C. Circuit has exclusive jurisdiction over matters ancillary to the issuance of FCC licenses. *Folden v. United States*, 56 Fed. Cl. 43 (2003) The Federal Circuit in *Folden v. United States*, 379 F. 3d 1344 (Fed. Cir.2004) upheld that broad determination, leaving the Claims Court in this case with no option but to dismiss Biltmore's complaint. *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 80 Fed. Cl. 322 (2008).

On appeal, the Federal Circuit assumed, without deciding, that there was indeed a contract in the case at bar but felt itself constrained by the *Folden* decision to find that the Claims Court nevertheless had no jurisdiction to review the matter. *Biltmore Forest Broadcasting FM, Inc. v. United States*, 555 F.3d 1375 (Fed. Cir. 2009). Biltmore sought reconsideration by the Federal Circuit en banc since the earlier *Folden* decision had been predicated on a substantially different fact pattern where there was no contract to begin with, and therefore there was no factual basis for the Claims Court to take jurisdiction in the first instance. En banc consideration was denied,[1] leaving the *Folden* ruling as the governing precedent on this critical point of law.

Biltmore has filed this Petition within the time prescribed by Rules 13.3 and 30 of this Court.

Summary of the Argument

The *Folden* decision creates a massive and growing chasm between the jurisdiction of the D.C.

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[1] *Biltmore Forest Broadcasting FM, Inc. v. United States*, Case No. 2008- 5055, Slip Op. (Fed. Cir.) April 20, 2009

Circuit and the Claims Court, a chasm founded on a fundamental disconnect between the rulings of the D.C. Circuit and the Federal Circuit. As will be set forth below, the D.C. Circuit routinely directs litigants before it who have contract-based or takings-based claims against federal agencies to take those claims to the Claims Court since the circuit court has no jurisdiction to resolve claims for money damages against the United States. The D.C. Circuit clearly believes that its jurisdiction over such matters is not exclusive and that an aggrieved litigant can obtain appropriate redress for the governmental action in the court established by Congress to entertain those claims - the Claims Court. *Folden*, on the other hand, followed by the Federal Circuit's ruling in the case at bar holds that the Claims Court has no jurisdiction over those matters if they are in any way ancillary to FCC licensing actions. The result is that we have two different circuit courts, each steadfastly asserting that the *other* court has exclusive jurisdiction over the matters in issue, with the bizarre result that *neither* court has jurisdiction over them. Aggrieved parties literally have no justiciable remedy when the FCC breaches its license-related contracts.

Because the FCC now awards most new licenses by auctions, the enforceability of such contracts has enormous and continuing significance to the affected industries. Just last year, for example, the FCC completed an auction in which licenses worth almost $20 *billion* dollars were sold.[2] The money at stake in

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[2] Statement of FCC Chairman Kevin Martin on the Conclusion of Auction 73, released March 18, 2008: "**Auction 73 Raised More Money Than Any Auction has Ever Raised**

these matters is therefore overwhelming in sheer magnitude. Apart from auctions, however, the FCC enters into a host of contracts with its regulatees in the course of licensing proceedings, including promissory notes, UCC security agreements, confidentiality agreements, settlement agreements, and consent agreements. None of these agreements are worth the paper they are written on if there is no court that has jurisdiction to enforce them.

The breadth of the *Folden* holding not only impairs the obligation of contracts but also immunizes the FCC from takings claims under the 5th Amendment when its acts would ordinarily require payment of just compensation. This would plainly be unconstitutional if the two jurisdictional statutes are not harmonized. In short, *Folden* has created an intolerable jurisdictional gap in the application to the FCC of the most fundamental principles of law.

REASONS FOR GRANTING THE PETITION

A. The Conflict Between the Circuits

Under ordinary circumstances, there is no question that the Court of Federal Claims would have jurisdiction to rule upon the existence, and breach, of the contract described above, and to award any appropriate damages against the United States. The chief issue which this Court is being called upon to

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The $19.592 billion in revenue raised in the 700 MHz auction is significantly more than raised in any past FCC auction. In comparison, the 2006 Advanced Wireless Service-1 (AWS-1) Auction raised $13.9 billion."

address is whether the FCC is immune from damage claims for breach of contract and, by extension, for takings compensable under the 5th Amendment. The Federal Circuit held in *Folden* that an alleged breach of contract by the FCC in the course of licensing proceedings was not subject to the jurisdiction of the Court of Federal Claims because radio licensing matters (and matters ancillary thereto) are exclusively subject to the jurisdiction of the Court of Appeals for the District of Columbia Circuit. *Folden* at 1358. Unfortunately, the D.C. Circuit *disclaims* -- correctly, in Petitioner's view -- any jurisdiction to hear monetary claims against the United States based on contract. See, for example, *Spectrum Leasing Corp. v. U.S.*, 764 F. 2d 891, 893 (D.C. Cir. 1985) and *Northpoint Technology, LLC v. FCC*, 414 F. 3d 61 (D.C. Cir. 2005).

In a similar vein, the D.C. Circuit has eschewed jurisdiction over 5th Amendment takings claims which arise in the context of administrative review. In *Building Owners and Managers Association International v. FCC*, 254 F. 3d 89, 100 (D.C. Cir. 2001), the D.C. Circuit, while upholding the FCC's imposition of constraints upon property owners, observed that "[p]etitioners are still free to make claims for just compensation on account of regulatory takings with respect to their individual buildings, but no such claims have been made here, nor could they be." Similarly, in *Wisconsin Valley Improvement Company v. Federal Energy Regulatory Commission*, 236 F.3d 738, 743 (D.C. Cir. 2001), the Court ruled: "But while WVIC may be able to advance a colorable Takings-Clause claim, it is not within our jurisdiction to adjudicate it. It is fixed law that, '[i]f there is a taking, and a claim for just compensation, then that is a Tucker Act matter to

be pursued in the Court of Federal Claims, and not before us.' *Transamerica Access Policy Study Group v. FERC*, 225 F.3d 667, 670 (D.C. Cir. 2000).") Clearly, the D.C. Circuit understands that it has no business adjudicating money claims against the United States which have been solely entrusted to the Claims Court. We thus appear to be presented with a rare Gaston-and-Alphonse scenario where both courts are politely deferring to the other, and neither court is assuming jurisdiction to adjudicate what would under every ordinary principle of law be a compensable claim.

The FCC regularly enters into contracts of many kinds in the course of its licensing activities. It routinely enters into settlements leading to consent decrees; it enters into non-disclosure agreements; it enters (or used to enter) into security agreements with auction winners who pay by the installment method; it settles licensing litigation;[3] and it conducts auctions. All of these agreements on their face appear to be legally binding obligations on both the Commission and the entities it regulates. The FCC also imposes obligations on its regulatees which on their face constitute takings of property by the Federal government which would normally be compensable under the 5th Amendment. See, for example, *Bell Atlantic Telephone Companies v. FCC*, 24 F. 3d 1441

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[3] One notable example is the settlement the FCC reached with Nextwave to free up over $4 billion dollars in licenses. *In re Nextwave Personal Communications, Inc., et al.*, Case No. 98 B 21529 (ASH) (B. Ct. S.D.N.Y.), *Order Granting Motion Pursuant to Section 363 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2002, 6004 and 9019 Approving Settlement and Releases*, signed May 25, 2004.

(D.C. Cir. 1994); *Building Owners and Managers, supra.*

Many of these FCC actions are taken in the course of licensing proceedings or in proceedings ancillary thereto. Assuming the FCC's administrative acts pass muster under the D.C. Circuit's deferential standard of review, a party could, as Biltmore did here, find itself in a situation where a contract with the FCC has been breached. Yet the necessary consequence of *Folden* is to completely immunize the FCC from paying the damages that its conduct would ordinarily warrant. Taken to its logical end, as the trial court did here, *Folden* acts as an absolute shield to FCC liability for serious misconduct. Nature abhors a vacuum, and this vacuum in the application of law must be abhorrent to a nation founded on the principle of equal justice under the law.

Fortunately, the D.C. Circuit has suggested a path out of this strange twilight world. It has recognized that federal agencies' licensing decisions may be lawful as administrative matters while at the same time implicating claims against the Federal government for money damages. The FCC has the exclusive right to grant radio licenses. In making those grants, it is guided by its perception of "the public interest, convenience and necessity," in the words of the Communications Act of 1934. It is not guided by whether or not it may be contractually bound to rule a particular way – indeed, one could argue that the FCC is *required* to grant a license as the public interest dictates even when a contractual obligation might conflict. Its judgments in this regard are then subject to review by the D.C. Circuit under the APA for

arbitrariness, irrationality, lack of support in the record, etc., giving significant deference to the Commission's interpretations of its own rules. The licensing determination is therefore quite distinct from any determination as to whether or not a contract existed between the FCC and the auction participants. Conceptually, therefore, a license award could be lawful while also breaching a contract.

In *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738 (D.C. Cir. 2001), for example, the D.C. Circuit reviewed the administrative action of a federal agency which had attached onerous conditions to its renewal of a license for a hydroelectric dam. The court found that FERC's action in imposing the conditions was perfectly lawful as an administrative licensing action, even though it might constitute a compensable taking over which the D.C. Circuit had no authority to rule. The aggrieved dam company was invited to take its 5th Amendment claim to the Court of Federal Claims. The fact that a licensing decision was administratively proper did not preclude the subsequent recovery of damages in a Court of Federal Claims suit. Similarly, in *Transamerica Access Policy Study Group v. FERC*, 225 F.3d 667, 670 (D.C. Cir. 2000), the D.C. Circuit reviewed the lawfulness of the agency's action under the Administrative Procedures Act, noting that if the result of the agency action was a 5th Amendment taking, the claimant could go to the Court of Federal Claims for relief once the agency proceeding was over. See also *Bell Atlantic Telephone Companies v. FCC*, *supra*, and *Building Owners and Managers v. FCC*, *supra*.

The same approach is taken to contract claims. In *Northpoint Communications*, supra, the appellant

before the D.C. Circuit raised a claim that the FCC had breached a contract in connection with certain licensing proceedings. The court ruled that any such claim was a Tucker Act matter which was not reviewable under the APA. *Northpoint, supra*, at 69, 76. As it stated in *Bell Atlantic, supra* at note 2, "the *Tucker Act* remedy is presumed available unless Congress has explicitly foreclosed it by another enactment, *Presault v. ICC*, 494 U.S. at 12, 110 S. Ct. at 922, and nothing in the Communications Act does so."

In short, the D.C. Circuit does not read the Communications Act as divesting the Claims Court of jurisdiction over license-related takings and contracts claims. Quite the contrary, the D.C. Circuit expressly *invites* petitioners aggrieved by administrative decisions who incur money damages based on takings or contracts claims to go to the Claims Court for relief after the licensing decision has been upheld -- the precise course pursued by Biltmore here. Plainly, the D.C. Circuit is under the impression that the Claims Court has jurisdiction to decide takings and contracts claims arising in FCC licensing proceedings, and it is reaching its own decisions based on that misapprehension. Equally plainly, the Federal Circuit takes the position that the Tucker Act remedy is *not* available when takings or contracts claims arise out of licensing decisions because that remedy is foreclosed by the Communications Act's grant of exclusive jurisdiction to the D.C. Circuit. The conflict between the circuits is stark, and more importantly, it leaves FCC applicants who have been cheated by the FCC from having any avenue of redress.

This Court has repeatedly ruled that a conflict between the circuits is good reason to grant certiorari. *Malat v. Riddell*, 383 U.S. 569 (1996); *Toilet Goods Association v. Gardner*, 387 U.S. 158, 160 (1967); *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1966). Here the conflict between the circuits has the unusual effect of leaving legitimately aggrieved parties with no court to turn to.

Unaccountably, the Federal Circuit couched the issue before it as "whether the Court of Federal Claims has jurisdiction to determine the existence of an alleged regulatory violation by the FCC." *Biltmore Forest FM*, supra, at 1381 (App. 9a). That of course was not -- and cannot have been -- the issue before that court. The FCC regulatory action had already conclusively been found lawful by the D.C. Circuit. That was the predicate for the case brought before the Claims Court. The issue there was whether a *lawful* regulatory action by the FCC could nevertheless render the FCC liable for damages for breach of contract, and that is also the issue before this court.

B. Congress Cannot Have Intended This Lacuna in Jurisdiction

The Federal Circuit in *Folden* undertook a historical review of Section 402(b) of the Communications Act and concluded that Congress intended by that section to divest all other courts of jurisdiction over any matters relating or ancillary to FCC licensing issues. *Folden* at 1356-1357. This necessarily leaves private parties with no recourse whatsoever for FCC takings or FCC contractual breaches. Yet there is not the slightest inkling that

Congress intended to grant the FCC unique immunity from two fundamental constitutional principles: the non-impairment of contracts, and compensation for the taking of private property. In 1951 when Section 402(b) was enacted, the possibility of auctioning licenses was not even a gleam in any one's eye. Congress could not possibly have been anticipating the broad spate of commercial dealings which the FCC now engages in with its regulated entities. More importantly, had it intended to carve out a jurisdictional safe harbor where the FCC -- alone of all the federal administrative agencies -- would be immune from any claims brought against it for takings or breaches of contracts, it would surely have said so directly, and there would have been comment on that issue. Yet not a single word was uttered by anyone involved with the bill suggesting that Congress intended such an extraordinary effect. What the *Folden* court conjures is the deliberate Congressional enactment of an unprecedented and far-reaching jurisdictional void without the slightest hint that it was undertaking such a step.

CONCLUSION

Biltmore respectfully requests that this Court either reverse the judgment of the Federal Circuit summarily or issue a writ of certiorari to review the case.

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(any footnotes trail end of each document)

2008-5055

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BILTMORE FOREST BROADCASTING FM, INC.,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

February 10, 2009, Decided

Appeal from the United States Court of Federal Claims in 07-CV-316, Senior Judge James F. Merow.

COUNSEL: Donald J. Evans, Fletcher, Heald & Hildreth, PLC, of Arlington, Virginia, argued for plaintiff-appellant. Of counsel was Raymond J. Quianzon.

Anuj Vohra, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for argued defendant-appellee. With him on the brief were Gregory G. Katsas, Assistant Attorney General, Jeanne E. Davidson, Director, and Patricia M. McCarthy, Assistant Director. Of counsel was Marla T. Conneely, Trial Attorney. Of counsel on the brief was C. Grey Pash, Jr., Attorney, Office of the General Counsel, Federal Communications Commission, of Washington, DC.

Before BRYSON, PLAGER, and DYK, Circuit Judges.

DYK, *Circuit Judge.*

Biltmore Forest Broadcasting FM, Inc. ("Biltmore") brought suit under the Tucker Act, alleging that the Federal Communications Commission ("FCC" or "Commission") breached an implied-in-fact contract that arose as the result of an auction for an FM broadcast license. The FCC allegedly breached the contract by violating the rules relating to the auction. The Court of Federal Claims granted the United States's motion to dismiss for lack of subject-matter jurisdiction. *Biltmore Forest Broad. FM, Inc. v. United States*, 80 Fed. Cl. 322 (2008) ("*Biltmore II*"). We affirm, and hold that the District of Columbia Circuit has exclusive jurisdiction to determine the alleged rules violation.

BACKGROUND

The following description is based on the complaint filed by Biltmore and the undisputed facts. For simplicity we confine this description to issues pertinent to this appeal.

Biltmore participated in an FCC auction for a broadcast license in Biltmore Forest, North Carolina. As part of the implementation of its mission to achieve diversification of ownership, FCC rules limit the "cognizable interest in licenses" that one person or single entity is allowed to control. *See* 47 C.F.R. § 73.3555. The FCC requires submission of a family media certification to determine the extent to which media interests owned by immediate family members are "subject to common influence or control." *See Clarification of Commission Policies Regarding Spousal Attribution*, 7 F.C.C.R. 1920, 1922-23 (1992).

"Under existing policy, applicants for new construction permits and for transfers or assignments of licenses are required to report the broadcast interests of all immediate family members (parents, siblings and offspring, as well as spouses) of any party to the application." *Id.* at 1922. "In addition, applicants must file exhibits to these applications, which provide full disclosure regarding the nature and extent of such familial interests." *Id.*

The FCC's rules themselves do not specify at which stage in the proceedings the required certification must be submitted. However, the Public Notice for this license auction addressed the question. *Biltmore* II, 80 Fed. Cl. at 323 (citing Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999, 14 F.C.C.R. 10632, 10641 (1999) (hereinafter "*Public Notice*")). The official *Public Notice* announcing the auction required, as part of the application, submission of a certification of media interests held by family members, stating that "all applicants must provide the information set forth in this section." 14 F.C.C.R. at 10641 (emphasis omitted). The *Public Notice* also stated that "[b]idders must certify . . . compliance with the Commission's policies relating to media interests of immediate family members." *Id.* One of the instructions warned that "[f]ailure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction." *Id.* at 10697 (emphasis omitted).

'Ultimately, Liberty Productions, L.P. ("Liberty") was the highest bidder and Biltmore was the second highest

bidder. *Biltmore II*, 80 Fed. Cl. at 324. Unlike Biltmore, Liberty did not file a family media certification prior to the auction. *Id.* at 323. However, Liberty filed its family media certification within a month of the auction's conclusion. *Id.* at 324.

Prior to the conclusion of an auction, bidder-applicants are precluded from contesting the ability of other bidder-applicants to participate in that auction. *Id.* at 323-24. "[T]he Commission concluded that the fairer and more expeditious approach would be to resolve any outstanding [qualification] issues after the auction." Implementation of Section 309(j) of the Communications Act, 14 F.C.C.R. 8724, 8731 (1999); *see also* id. at 8732 ("We deny reconsideration of our determination to defer until after the auction basic qualifications issues . . . .").

After the auction's conclusion, in administrative proceedings before the FCC, Biltmore argued that Liberty should have been disqualified for failure to submit a timely family media certification and that the license should have been awarded to Biltmore as the next highest bidder. *Biltmore Forest Broad. FM, Inc. v. FCC*, 355 U.S. App. D.C. 170, 321 F.3d 155, 159 (D.C. Cir. 2003) ("*Biltmore I*"). Biltmore noted that § 73.5002(b) of the FCC's regulations provides that "[t]o participate in . . . [an] auction[], all applicants *must* timely submit short-form applications [], along with all required certifications, information and exhibits, pursuant to the provisions of Section 1.2105(a) *and any Commission public notices*." Pl.-Appellant's Final Br., *Biltmore I*, No. 01-1392, at 5 (D.C. Cir. July 18, 2002) (emphases in brief). The *Public Notice* stated that all applicants "must" provide the family media certification

and that "[f]ailure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction." 14 F.C.C.R. at 10697 (emphasis omitted).

Biltmore argued, moreover, that § 1.2105(b)(1) of the FCC's rules also required disqualification. That provision stated "Any short-form application . . . that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned." 47 C.F.R. § 1.2105(b)(1).[1] Biltmore's theory was, thus, that the *Public Notice* together with the FCC's rules required that Liberty submit a family ownership certification together with its original application and that the FCC could not allow this defect to be cured after the completion of the bidding process. *In re Liberty Prods., L.P.*, 16 F.C.C.R. 12061, 12068 (adopted April 12, 2001, released May 25, 2001). Biltmore did not raise a contract claim to the FCC.

In a Memorandum Opinion and Order adopted on April 12, 2001, the FCC held that Liberty was not disqualified due to the late submission of the family ownership certification, granted Liberty's application for a construction permit, and dismissed Biltmore's mutually exclusive application. *Id.* at 12068-71, 12095. The FCC first addressed whether § 1.2105(b) of its rules required disqualification. *Id.* at 12068. The FCC found that "the [FCC] rules do not expressly provide that a short-form application omitting this particular certification is unacceptable for filing and will be dismissed with prejudice (*i.e.*, with no opportunity to

supply the missing certification after the short-form filing deadline.)." *Id.* The FCC concluded that "Section 1.2105(b) [of the rules] requires the dismissal with prejudice, without the opportunity to correct after the applicable filing deadline, only of" a narrow category of information. *Id.* The family ownership certification does not fall into that narrow category. *Id.* at 12068-69. The FCC also concluded that 47 C.F.R. § 73.5002(b) does not require disqualification. Even though § 73.5002(b) provides that applicants must comply with "any Commission public notices" in order to participate in an auction, it does not provide notice that the omission of a family media certification "will result in the dismissal of the short-form application with no opportunity to amend." *Id.* at 12069. In addition, the *Public Notice* "does not expressly state that the omission of this particular certification . . . will render the short-form application defective . . ., such that it cannot later be amended." *Id.* at 12069. Rather, it is merely a "general admonishment" which "echoes the general requirements applicable to all short-form information." *Id.* at 12069. "Fairness demands explicit notice for a severe sanction, such as the dismissal of an application." *Id.* at 12070. This *Public Notice* "does not provide sufficient notice that a short-form application not containing the familial certification must be dismissed." *Id.*

Biltmore appealed the FCC's licensing decision to the District of Columbia Circuit, pursuant to 47 U.S.C. § 402(b)(1), (5), & (6). *Biltmore II*, 80 Fed. Cl. at 324. Biltmore argued that Liberty should have been disqualified. Biltmore urged that the FCC's interpretation conflicted with the plain language of its rules, and that, even if the rules were ambiguous, the FCC's interpretation should not be given deference

because the FCC stood to gain monetarily by the interpretation.

The District of Columbia Circuit affirmed the FCC's award of the license to Liberty. *Biltmore I*, 321 F.3d at 160, 165. The court held that the FCC was correct that a family certification is not one of the specifically required documents under 47 C.F.R. § 1.2105(b)(1), which would require immediate disqualification without an opportunity to amend. *Id.* at 160-61. Deferring to the agency's interpretation, which was controlling "unless . . . plainly erroneous or inconsistent with the regulation," the court held that the FCC did not act unreasonably in determining that neither its rules nor the *Public Notice* required the dismissal of Liberty's application for failure to timely file a family media certification. *Id.* The court stated that the FCC "need not . . . disqualify Liberty after the auction on the basis of an omission that, according to the [*Public Notice*], would disqualify an applicant if discovered prior to the auction." *Id.* at 161. "Because the family certification was not required by § 1.2105, the omission could be cured." *Id.*

Biltmore's subsequent petition for certiorari to review the District of Columbia Circuit's decision was denied. *Biltmore Forest Broad. FM, Inc. v. FCC*, 540 U.S. 981, 124 S. Ct. 463, 157 L. Ed. 2d 371 (2003).

Biltmore then filed the present damages action in the Court of Federal Claims, urging that the FCC breached an implied-in-fact contract when it granted a broadcast license in violation of the published terms for the auction.[2] *Biltmore II*, 80 Fed. Cl. at 322-23. Biltmore's complaint presented to the Court of Federal Claims

was identical to Biltmore's first-listed issue presented for review by the District of Columbia Circuit:

> 1. The FCC issued a Public Notice establishing mandatory preauction requirements for participation in an action for broadcast licenses. The winner of the auction did not comply with one of these prerequisites. Other bidders had recognized that the bidder's application was defective and placed their bids accordingly. Could the FCC excuse the winning bidder's non-compliance after the auction and declare it the winner?

Id. at 324-25. The Court of Federal Claims granted the United States's motion to dismiss for lack of subject-matter jurisdiction largely based on our decision in *Folden v. United States*, 379 F.3d 1344 (Fed. Cir. 2004), discussed below. In the alternative, the court also held that either Biltmore's claims were barred by claim preclusion or Biltmore's claims for monetary relief were limited to bid preparation and proposal costs. *Biltmore II*, 80 Fed. Cl. at 336.

Biltmore timely appealed. On April 30, 2008, Biltmore filed a petition with this court requesting an initial hearing en banc and reconsideration of *Folden*. That petition was denied on June 17, 2008, and Biltmore's appeal was heard by a panel of this court.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review whether the Court of Federal Claims possesses subject-matter jurisdiction de novo. *See Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc in relevant part).

The Tucker Act of 1887 grants the Court of Federal Claims jurisdiction over, inter alia, "[a]ny claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The elements of an implied-in-fact contract are: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance[;] and (4) 'actual authority' on the part of the government's representative to bind the government." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). In the past both the Supreme Court and we have held that contract and takings claims, in such circumstances, can be founded on regulatory actions by Congress or federal agencies. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 110 S. Ct. 914, 108 L. Ed. 2d 1(1989). The question here is whether the Court of Federal Claims has jurisdiction to determine the existence of an alleged regulatory violation by the FCC.

Biltmore's contractual theory is clear enough. Biltmore argues that Liberty should have been disqualified and that, as a result, a contract exists between the FCC and Biltmore, as the next highest bidder. Biltmore is correct that an auction can result in a contract. "General principles of auction law provide a baseline rule that the close of an auction--the fall of the hammer--signals acceptance of the offer and creates a binding contract

between the seller and the high bidder." *In re GWI PCS 1 Inc.*, 230 F.3d 788, 807 (5th Cir. 2000).[3]

Biltmore contends that the FCC has a contractual obligation to grant a license to the highest bidder at the close of an auction if that bidder fulfills the statutory eligibility requirements. *See In re Nextwave Pers. Commc'ns, Inc.*, 200 F.3d 43, 57, 60-61 (2d Cir. 1999). Indeed, the FCC itself appears to recognize that its auctions result in a contract. *In re BDPCS, Inc.*, 15 F.C.C.R. 17590, 17599-600 (2000) ("The announcement of the winning bidder in an auction conducted by the Commission, like the acceptance of high bids in auctions in other settings, terminates the bidding and establishes, as of the moment of the acceptance of the high bid, the binding obligation to pay the winning bid price for the licenses." (footnote omitted)). Curiously, on appeal the government argues that "FCC licensing auctions are not commercial transactions resulting in a contractual relationship between the FCC and the license awardee." Def.-Appellee's Br. & Rule 30(f) App. at 7. Nonetheless, we assume for the purposes of this appeal, without deciding, that an FCC license auction results in a contract between the FCC and the high bidder.[4]

Even under this assumption, this case hinges on whether the District of Columbia Circuit has exclusive jurisdiction to determine whether the FCC complied with its own rules in connection with the award of a construction license to Liberty and the denial of a license to Biltmore under 47 U.S.C. § 402(b). Section 402(b) provides:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> > (1) Any applicant for a construction permit or station license, whose application is denied by the Commission.
> >
> > ...
> >
> > (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
> >
> > (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

In interpreting an earlier version of § 402, the Supreme Court stated that an FCC order denying an application for a license "was reviewable only by a direct appeal . . . under 47 U.S.C. § 402(b)." *United States v. Storer Broad. Co.*, 351 U.S. 192, 208, 76 S. Ct. 763, 100 L. Ed. 1081 (1956); *see Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 8, 62 S. Ct. 875, 86 L. Ed. 1229 (1942) ("[O]rders granting or denying applications for construction permits or station licenses . . . were made reviewable by the Court of Appeals for the District of Columbia"). Recently, in *Folden*, we agreed and held that it has been long-settled that § 402(b) provides that the District of Columbia Circuit is the exclusive location for judicial review of the FCC's licensing decisions. *Folden*, 379 F.3d at 1356-57 (collecting cases).

> Therefore, the Court of Federal Claims lacks subject-matter jurisdiction to review the FCC's denial of a construction permit.[5]

Biltmore, however, asserts that it does not seek to overturn the FCC's licensing decision and does not now seek to secure the license. Biltmore points out that the statute does not give the District of Columbia Circuit jurisdiction over implied-in-fact contracts. Rather, exclusive jurisdiction to adjudicate disputes as to implied-in-fact contracts rests with the Court of Federal Claims. What Biltmore ignores is that the District of Columbia Circuit not only has exclusive jurisdiction to review the grant or denial of FCC licenses, but also has exclusive jurisdiction to adjudicate the underlying issue of FCC rules compliance necessary to the licensing decision. We decided this exact issue in *Folden*.

In *Folden*, the Court of Federal Claims plaintiffs sought to secure FCC cellular licenses through lotteries, asserting that they had an implied-in-fact contract with the FCC that obligated the FCC to hold lotteries for the licenses and that instead the FCC had proposed to auction the licenses. 379 F.3d at 1346, 1353. The plaintiffs then sued the FCC in the Court of Federal Claims for breach of an implied-in-fact contract, "takings in violation of the Fifth Amendment, and unconstitutional takings of their contract rights in violation of Article III of the U.S. Constitution." *Id.* at 1352. The Court of Federal Claims dismissed for lack of subject-matter jurisdiction under 47 U.S.C. § 402(b), and, in the alternative, dismissed for failure to state a claim upon which relief could be granted--due to lack of mutuality of intent to contract. *Id.* at 1352-54. On

appeal, we held that it is "clear that the D.C. Circuit's jurisdiction over claims that fall within subsection 402(b) is exclusive," and that § 402 preempts the Court of Federal Claims's Tucker Act jurisdiction over the same subject matter. *Id.* at 1356-57. The Court of Federal Claims thus lacked jurisdiction to adjudicate whether the FCC was obligated to award the licenses by lottery because that issue was within the District of Columbia Circuit's exclusive jurisdiction over issues "ancillary" to FCC licensing decisions. *Id.* at 1360. This panel is bound by the holding in *Folden.*

At an earlier stage of this appeal, Biltmore argued that an initial en banc hearing was appropriate because *Folden* governed this case. Pl.-Appellant's Motion for Hearing En Banc, *Biltmore II*, No. 2008-5055, at 1 (Fed. Cir. Apr. 30, 2008) ("Because a panel of this Court ruled in [*Folden*] that the Court of Federal Claims has no jurisdiction over contract-based claims against the FCC in the radio licensing context, any other panel of this Court will presumably be bound by that determination, rendering an appeal to a normal three-judge panel both futile and a waste of resources for all concerned."). However, Biltmore now argues that this court's holding in *Folden* was dictum. Biltmore notes that the Court of Federal Claims had originally decided the case underlying *Folden* on alternative grounds, holding that (1) there was no subject-matter jurisdiction because of the District of Columbia Circuit's exclusive jurisdiction, and (2) that no implied-in-fact contract existed. On appeal we addressed only the first ground, holding that subject-matter jurisdiction was lacking. Biltmore argues that the holding by this court in *Folden*--that the court lacked subject-matter jurisdiction--was somehow a hypothetical exercise because the non-

existence of a contract was not overturned on appeal. This argument makes no sense. The panel in *Folden* did exactly what it was supposed to do. It addressed the jurisdictional holding before addressing the merits. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2716, 171 L. Ed. 2d 457 (2008). That jurisdictional holding was not dictum.

Biltmore also appears to suggest that this case is distinguishable from *Folden* because the plaintiff in *Folden* failed to exhaust the available administrative remedies (at the FCC with appeals to the District of Columbia Circuit), whereas here Biltmore fully exhausted all administrative remedies. Biltmore argues that the District of Columbia Circuit's decision is not binding on the Court of Federal Claims because the that decision gave deference to the agency's interpretation of the auction regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), whereas the Court of Federal Claims would review the FCC's action under a de novo standard. Biltmore theorizes that the FCC's alleged self-interest bars deference to the FCC's interpretation. We are not persuaded by this argument. First, Biltmore unsuccessfully made a similar argument, that the FCC should not be given deference due to its self-interest in the interpretation, to the District of Columbia Circuit and in its petition for certiorari. *Biltmore II*, 80 Fed. Cl. at 326. The District of Columbia Circuit rejected the self-interest argument. Biltmore is essentially asking us to re-adjudicate this question and to create inconsistent results for the same question in this court and the District of Columbia Circuit. Second, whether or not the precise issue was raised before the District of

Columbia Circuit, jurisdiction conferred by § 402(b) is exclusive. There is no jurisdiction in the Court of Federal Claims to initially adjudicate or to re-adjudicate the FCC's compliance with its rules and regulations in licensing proceedings. The District of Columbia Circuit's jurisdiction over those issues is exclusive. We need not decide in this case whether, if the District of Columbia Circuit had found a rules violation, the Court of Federal Claims would have jurisdiction to consider an implied-in-fact contract claim founded in the District of Columbia Circuit's adjudicated rules violation. Biltmore does not and could not here base a claim on the District of Columbia Circuit's decision.

In short, the District of Columbia Circuit has exclusive jurisdiction to adjudicate alleged rules violations in FCC licensing proceedings. The Court of Federal Claims has *no* subject-matter jurisdiction to re-adjudicate that issue.

AFFIRMED

COSTS

No costs.

Footnotes

1Section 1.2105(b) states, inter alia:

> (1) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to

the applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short-form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

2Biltmore alternatively characterized the issue as a taking in violation of the Fifth Amendment, but

admitted at oral argument that the complaint does not allege a takings claim.

3*See also Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 520, 45 S. Ct. 181, 69 L. Ed. 417, 60 Ct. Cl. 1022 (1925) ("The terms and conditions of the [government's auction] as set forth in the advertisement [are] binding alike upon the United States and the bidders."); *Blossom v. R.R. Co.*, 70 U.S. (3 Wall.) 196, 206, 18 L. Ed. 43 (1865) ("[A]s soon as the hammer is struck down . . . the bargain is considered as concluded, and the seller has no right afterwards to accept a higher bid nor the buyer to withdraw from the contract."); *Lawrence Paper Co. v. Rosen & Co.*, 939 F.2d 376, 378-79 (6th Cir. 1991) ("The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of a hammer.") (quoting 7 Am. Jur. 2d Auctions & Auctioneers § 16 (1980 & Supp. 1991)); *Bottorff v. Ault*, 374 F.2d 832, 835 (7th Cir. 1967) ("The sales here were at auction. They were completed when the hammer fell or when the auctioneer said 'sold.'"); *Barclay v. United States*, 333 F.2d 847, 857, 166 Ct. Cl. 421 (Ct. Cl. 1964) ("After the date their bid was accepted by the Department . . ., both parties were contractually bound to do business with one another on the terms set out in the contract.").

4In one of its alternative holdings, the Court of Federal Claims analyzed the facts under 28 U.S.C. § 1491 as an unsuccessful bidder scenario, and found that damages were limited to bid preparation costs. *Biltmore II*, 80 Fed. Cl. at 334, 336. We need not decide if this was correct given our disposition of the case.

5Though the issue was not properly raised by Biltmore,

Folden holds that a takings claim is equally subject to the exclusive jurisdiction of the District of Columbia Circuit. 379 F.3d at 1352, 1360. In any event, a takings claim cannot rest on an alleged violation of the statute or regulation; instead, the analysis is predicated on an assumption of the validity of the government action. *Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1331 (Fed. Cir. 2006).

No. 07-316 C

UNITED STATES COURT OF FEDERAL CLAIMS

BILTMORE FOREST BROADCASTING FM, INC.
Plaintiff,

v.

THE UNITED STATES,
Defendant.

January 25, 2008, Filed

COUNSEL: Raymond J. Quianzon, Arlington, VA, for plaintiff. Donald J. Evans, of counsel.

Marla T. Conneely, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for defendant, with whom were Peter D. Keisler, Assistant Attorney General, Jeanne E. Davidson, Director, and Mark A. Melnick, Assistant Director. Grey Pash, Office of General Counsel, Federal Communications Commission, of counsel.

OPINION

Merow, *Senior Judge*

Plaintiff asserts breach of an implied-in-fact contract with the Federal Communications Commission ("FCC") for an auction to obtain a FM broadcast license in Biltmore Forest, North Carolina. Plaintiff, the second-highest bidder, asserts that the highest bidder and eventual licensee, Liberty Productions, L.P. ("Liberty"), was not a qualified bidder under the

published terms of the auction. By an action filed in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), plaintiff contested the FCC's decision to award the license to Liberty and dismiss plaintiff's competing application. The D.C. Circuit upheld the FCC's licensing decision, rejecting claims of plaintiff and others concerning the conduct of the auction. *Biltmore Forest Broad., FM, Inc. v. FCC*, 355 U.S. App. D.C. 170, 321 F.3d 155 (D.C. Cir.), *cert. denied*, 540 U.S. 981, 124 S. Ct. 463, 157 L. Ed. 2d 371 (2003) (" *Biltmore Forest*").

Responding to plaintiff's instant breach of contract suit, defendant filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, asserting the Court of Federal Claims lacks subject matter jurisdiction over this matter, in that the D.C. Circuit Court of Appeals has exclusive jurisdiction over all FCC licensing and related disputes under the Communications Act, 47 U.S.C. § 402 (2000). Alternatively, defendant argues that if this court has subject matter jurisdiction, over the breach of contract claim pleaded, then any recovery is barred by the doctrine of claim preclusion.

Factual background

Operation over FM bandwidth requires an FCC license. Bidders, including plaintiff and Liberty had license applications pending prior to the auction. [1] Bidding instructions and application criteria were contained in the FCC's Public Notice dated July 9, 1999. *Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999* ("Public Notice"), 14 F.C.C.R. 10632, 10697-99 (1999). [2] The

Public Notice warned that failure to submit "required" information would result in dismissal of the application and inability to participate in the auction. "**Failure to submit required information by the resubmission date will result in dismissal of the application and inability to participate in the auction.** See 47 C.F.R. § 1.2105(b)." 14 F.C.C.R. at 10697 (emphasis in original).

A certification of media interests held by family members was among the requirements of the Public Notice: [3]

> **whether or not a New Entrant Bidding Credit is** [4] being sought, all applicants must provide the information set forth in this section. The following information is required:
>
> > . . . *bidders or attributable interest holders in bidders must certify, under penalty of perjury that the bidder complies with the Commission's policies relating to media interests of immediate family members. See* Policy Statement, *Clarification of the Commission's Policies Regarding Spousal Attribution*, 7 FCC Rcd 1920 (1992).

14 F.C.C.R. at 10698-99 (emphasis in original) (footnote added).

Liberty did not file a family media certification prior to the auction. Plaintiff alleges the FCC "apparently overlooked" this defect and there was no procedural vehicle for bidders to contest the bona fides of other bidders. Indeed, applicants were precluded from doing so. *Implementation of Section 309(j) of the*

Communications Act, 14 F.C.C.R. 8724, 8732-33 (1999) ("We thus reaffirm our determination that, regardless of how many applicants remain and whether an issue is potentially dispositive, the public interest is best served by deferring the consideration of outstanding qualifications issues until after the auction and resolving such issues only with respect to auction winners.").

The auction began on September 28, 1999. On November 8, 1999 when the hammer fell following protracted bidding, there were only two remaining bidders--plaintiff and Liberty. Plaintiff knew Liberty, the highest bidder, had not submitted a family media certification and assumed the FCC would reject Liberty's bid and license application on that basis. Any additional bid by plaintiff, the second highest bidder, would have raised the ante by several hundred thousand dollars. Plaintiff [5] asserts it promptly pointed out Liberty's deficiency to the FCC. On November 25, 1999, Liberty filed its family media certification. [6]

In its Complaint filed in this court on May 21, 2007, plaintiff asserts breach of an implied contract that the FCC would conduct the sale according to the terms of the Public Notice. Plaintiff claims it was the highest qualified bidder and should have been awarded the license. Plaintiff requests $ 8,000,000 in damages, the difference between its bid and the current value of the FCC license.

Liberty's application was ultimately approved by the FCC, its tardily-filed family media certification notwithstanding. Plaintiff contested the granting of the license to Liberty in administrative proceedings before the FCC. [7] In a Memorandum Opinion and Order

adopted on April 12, 2001, and released on May 25, 2001, resolving the applications of several of the bidders, the FCC reversed an earlier determination by an Administrative Law Judge ("ALJ") disqualifying Liberty on a site certification issue. The ALJ had found Liberty misrepresented facts concerning the availability of a transmitter site. *In re Applications: Nat'l Commc'ns Indus.*, 5 F.C.C.R. 2862, 2879 (ALJ 1990). [8]

Pursuant to 47 U.S.C. § 402(b)(1) (2000), plaintiff appealed the FCC's licensing decision to the United States Court of Appeals for the District of Columbia Circuit. Plaintiff characterized that appeal as from a final order of the FCC granting Liberty's application for a construction permit and dismissing plaintiff's mutually exclusive application. Jurisdiction under 47 U.S.C. § 402(b)(1), (5)-(6) and 28 U.S.C. § 2342(1) (2000) was asserted. [9] *See Final Brief for Appellant, Biltmore Forest*, 2002 WL 3424519, at *ix. (D.C. Cir. 2002) (No. 01-1392).

The first-listed issue presented for review by the D.C. Circuit is identical to plaintiff's Complaint here:

> 1. The FCC issued a Public Notice establishing mandatory pre-auction requirements for participation in an action for broadcast licenses. The winner of the auction did not comply with one of these prerequisites. Other bidders had recognized that the bidder's application was defective and placed their bids accordingly. Could the FCC excuse the winning bidder's non-compliance after the auction and declare it the winner?

2002 WL 34244519, at *1.

After the conclusion of the bidding process, "[t]he FCC then had to consider a number of petitions to deny [the award to Liberty] which were filed by the losing applicants. Chief among the issues raised were (1) the fact that Liberty had failed to include in its auction application form a certification which the FCC's public notices had represented to be an essential prerequisite to participation in the auction."

> Liberty's omission of basic eligibility information and its claim to an unwarranted bidding credit dramatically affected the integrity of the auction itself. By the latter stages of the auction, [Biltmore] was bidding only against Liberty, an applicant who the FCC's own public notices indicated should not have been permitted to participate at all. [Biltmore] was boxed in the quandary of either continuing to bid up the price against a presumptively ineligible applicant or resting on its last high bid in the expectation that the FCC would enforce its own mandates.

2002 WL 34244519, at *8-9. Authority cited included *Erie Coal & Coke v. United States*, 266 U.S. 518, 520, 45 S. Ct. 181, 69 L. Ed. 417, 60 Ct. Cl. 1022 (1925), also relied upon in this case for the fundamental precept that the terms of an auction sale are binding on the government and bidders alike (Pl.'s Opp'n 6). In conclusion, plaintiff implored the D.C. Circuit to "requir[e] [the FCC] to abide by the rules it proclaimed for Auction 25, by dismissing Liberty's application, and by ordering it to designate [Biltmore] as the auction winner." 2002 WL 34244519, at *33.

Plaintiff argued to the D.C. Circuit, as it does here, that the family media certification was required and because it was not timely filed, Liberty's license application should not have been granted. The difference between the cases is the remedy sought. Before the D.C. Circuit, plaintiff sought the license. Before this court, plaintiff seeks to recover the economic benefit of the bargain.

The D.C. Circuit affirmed the FCC's award of the license to Liberty, holding the FCC did not act arbitrarily and capriciously in determining its regulations did not require the dismissal of Liberty's application for failure to timely file a family media certification, deferring to the agency's interpretation of its regulations, which were controlling "unless . . . plainly erroneous or inconsistent with the regulation." *Biltmore Forest*, 321 F.3d at 160. The FCC's findings in this regard were found not to fall below that standard. Specifically, the D.C. Circuit found that agency regulations permitted the FCC to allow Liberty an opportunity to cure the defect by filing the family media certification after the deadline. *Id.* Noting that the family certification was required not by regulation but by the Public Notice, the D.C. Circuit reasoned:

> the family certification is not among those required under [47 C.F.R.] Section 1.2105, the omission of which incurably disqualifies the applicant as specified in § 1.2105(b)(1). [10] It was not unreasonable for the Commission to treat the omission of a certification required only by a public notice as a "defect" other than "failure to make a certification" as that term is used in § 1.2105(b), and thus to provide the opportunity

> for correction that § 1.2105(b)(2) allows for such a defect.

321 F.3d at 160-61. The D.C. Circuit added that "it should not--more properly, that it need not--disqualify Liberty after the auction on the basis of an omission that, according to the Notice, would disqualify an applicant if discovered prior to the auction." 321 F.3d at 161.

In its administrative determination, the FCC concluded the Public Notice did not clearly require automatic disqualification for failure to submit the family media certification. Although the Public Notice stated that a bidder who failed to submit "required information" before the auction would be "[unable] to participate in the auction," it did not state that such an omission was incurable if it came to light after the auction was held. Because the Public Notice did not directly speak to this situation, disqualification on that basis would deprive Liberty of fair warning that its application might be disqualified without an opportunity to correct it, contrary to the rule endorsed in *High Plains Wireless, L.P. v. FCC*, 349 U.S. App. D.C. 256, 276 F.3d 599, 607 (D.C. Cir. 2002) ("That the rule did not afford adequate notice reflexive bidding was unlawful is itself sufficient justification for the Commission not to penalize [the bidder].").

In seeking review of *Biltmore Forest*, in its petition for a *writ of certiorari*, plaintiff asserted that the degree of deference typically due administrative determinations should not apply because the FCC was selling licenses and accordingly, was an interested party in the licensing process, particularly when modifying the published terms of the auction would net a higher yield.

Petition for Writ of Certiorari, Biltmore Forest, 2003 WL 22428481, *13-17 (2003) (No. 03-48). The United States Supreme Court denied *certiorari. Biltmore Forest*, 540 U.S. 981, 124 S. Ct. 463, 157 L. Ed. 2d 371 (No. 03-48) (2003).

Defendant's Motion to Dismiss

For the purposes of a RCFC 12(b)(1) motion to dismiss, the allegations stated in the Complaint are assumed to be true and jurisdiction is decided on the pleadings submitted. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996); *see generally* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (3d ed. 2004). As defendant's Rule 12(b) motion questions the court's subject matter jurisdiction, evidence outside the pleadings may be considered. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993). In determining subject matter jurisdiction, the court "'looks to the true nature of the action in determining the existence or not of jurisdiction.'" *Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1372 (Fed. Cir. 2005) (citing *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997)).

In responding to a motion to dismiss for lack of subject matter jurisdiction, plaintiff has the burden to establish jurisdiction by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988).

Defendant's Motion to Dismiss asserts plaintiff's claims arise under the Communications Act in which Congress vested exclusive jurisdiction over FCC decisions in the District of Columbia Circuit. The Communications Act, 47 U.S.C. § 402 (2000), provides in relevant part:

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

. . .

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

As plaintiff's action here is, at its root, an action by a bidder "whose interests are adversely affected" by the FCC's granting of a license to Liberty and denial of plaintiff's license application, the D.C. Circuit has exclusive jurisdiction under this statutory grant, defendant states.

Plaintiff responds that concurrent jurisdiction in the D.C. Circuit over licensing decisions, and in the Court of Federal Claims over contract claims, is consistent with Supreme Court and Federal Circuit precedent. For example, in *Wisconsin Valley Improvement Co. v. FERC*, 344 U.S. App. D.C. 371, 236 F.3d 738 (D.C. Cir. 2001), the court exercised its jurisdiction over issues related to licensing of hydroelectric dams but, to the extent conditions imposed on that license were so onerous as to rise to a taking, the D.C. Circuit recognized the Court of Federal Claims also had jurisdiction. *See also Transmission Access Policy Study Group v. FERC*, 343 U.S. App. D.C. 151, 225 F.3d 667, 690 (D.C. Cir. 2000); *Bell Atl. Tel. Cos. v. FCC*, 306 U.S. App. D.C. 333, 24 F.3d 1441, 1444-45 n.1 (D.C. Cir. 1994). *Cf. Northpoint Tech., Ltd. v. FCC*, 367 U.S. App. D.C. 170, 414 F.3d 61, 76 (D.C. Cir. 2005) (noting that if the FCC violated an agreement, that would be a Tucker Act matter); *MegaPulse, Inc. v. Lewis*, 217 U.S. App. D.C. 397, 672 F.2d 959, 968-69 (D.C. Cir. 1982) (recognizing co-existence of Tucker Act and APA).

That agency decisions may pass administrative muster yet be independently actionable in this court on takings, contract or other grounds, is well-recognized. As plaintiff points out, at its core, *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996), applied the distinction between regulatory action, which may be appropriate and accordingly enforceable, yet constitute a contractual breach redressable in the Court of Federal Claims. *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 120 S. Ct. 2423, 147 L. Ed. 2d 528 (2000) recognized that questions concerning the propriety of

regulatory actions are independent from considerations of contract, the latter remedied in this court. Similarly, in litigation surrounding the Nuclear Waste Policy Act ("NWPA") and contracts between the Department of Energy ("DOE") and utilities, the D.C. Circuit has construed statutory obligations, deferring contractual remedies to the Court of Federal Claims. *See also Wisc. Elec. Power Co. v. United States*, 341 U.S. App. D.C. 219, 211 F.3d 646, 648 (D.C. Cir. 2000) (discussing prior cases of statutory construction and concluding: "[t]he Court of Federal Claims, not this court, is the proper forum for adjudicating contract disputes"); *Ind. Mich. Power Co. v. DOE*, 319 U.S. App. D.C. 209, 88 F.3d 1272 (D.C. Cir. 1992); *N. States Power Co. v. DOE*, 327 U.S. App. D.C. 20, 128 F.3d 754, 759 (D.C. Cir. 1997). *See also Neb. Pub. Power Dist. v. United States*, 73 Fed. Cl. 650 (2006), *appeal granted*, 219 Fed. App'x. 980 (Mar. 1, 2007) (construing the extent of the D.C. Circuit Court's jurisdiction over statutory and regulatory compliance under the NWPA and on related contract matters in the Court of Federal Claims).

Congress assigns jurisdiction to all federal courts except the Supreme Court. *In re United States*, 877 F.2d 1568, 1571 (Fed. Cir. 1989). Congress can withdraw jurisdiction from the Court of Federal Claims and assign it elsewhere. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984). *See also Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005) ("Tucker Act review of takings claims is precluded where Congress has provided 'a specific and comprehensive scheme for administrative and judicial review.'"); *Tex. Peanut Farmers v. United States*, 409 F.3d 1370 (Fed. Cir. 2005) (applying statutory grant of exclusive jurisdiction

to district courts of claims against the Federal Crop Insurance Corporation); *Wilson v. United States*, 409 F.3d 1370 (Fed. Cir. 2005) (affirming conclusion that direction of 42 U.S.C. § 405(g) that claims arising under the Medicare Act "shall be brought in the district court of the United States" was a congressional withdrawal of Tucker Act jurisdiction); *Massie v. United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999) ("[A] contract will not fall within the purview of the Tucker Act if Congress has placed jurisdiction over it elsewhere."); *Sw. Marine of S.F., Inc. v. United States*, 896 F.2d 532 (Fed. Cir. 1990) (holding the Federal Court Improvement Act, 28 U.S.C. § 1295, did not carve out a ship repair contract exception to the federal district courts' exclusive jurisdiction over maritime contracts).

Withdrawal of Tucker Act jurisdiction is strictly construed. *Cathedral Candle Co. v. ITC*, 400 F.3d 1352, 1365 (Fed. Cir. 2005) ("'[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'") (citing *Ruckelshaus v. Monsanto* Co., 467 U.S. at 1018). The Tucker Act is a broad grant of jurisdiction to the Court of Federal Claims, and any withdrawal of Tucker Act jurisdiction is tantamount to a partial repeal of that Act. Accordingly, courts will not find the requisite intent to shrink the Court of Federal Claim's jurisdiction "by implication." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017-19, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984) (explaining that for Tucker Act jurisdiction to be displaced, there must be 'an unambiguous intention to withdraw the Tucker Act remedy.'); *Preseault v. ICC*, 494 U.S. 1, 12, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) (same); *Qwest Corp. v. United States*, 48

Fed. Cl. 672, 686 (2001) ("'A new statute will not be read as wholly or even partially amending a prior one unless there exists a "positive repugnancy" between the provisions of the new and those of the old that cannot be reconciled .'") (quoting *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 133-34, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)).

The Federal Circuit recently reiterated and applied these principles in *Acceptance Insurance Cos. v. United States*, 503 F.3d 1328 (Fed. Cir. 2007). An insurance holding company claimed the Department of Agriculture blocked the sale of crop insurance policies held by America Growers, one of its subsidiaries. The Federal Crop Insurance Corporation ("FCIC"), a wholly-owned government corporation within the Department of Agriculture, by statute, regulates private crop insurance and issues reinsurance policies. Also by statute, jurisdiction for all suits by or against the FCIC is in federal district court. Applying its oversight authority over the crop insurance industry, FCIC refused to approve the sale of American Growers' assets for $ 21.5 million, finding it would be detrimental to the interests of farmers and taxpayers. The thwarted sale put American Growers in a precarious financial situation and it was ultimately liquidated by the Nebraska Department of Insurance. The Federal Circuit held plaintiff's taking claim could co-exist with the statutory grant of exclusive jurisdiction requiring "all suits" "by or against the [FCIC]" must be brought in district court. Accordingly, "[t]he proper inquiry is whether the statutory language 'all suits by or against the [FCIC]' includes a Fifth Amendment takings claim based on actions of the FCIC." 503 F.3d at 1337. Concluding a taking claim was

not against the agency, but against the sovereign, the Federal Circuit held the Court of Federal Claims was not without subject matter jurisdiction.

Defendant counters that the Federal Circuit has applied the Communications Act to preclude jurisdiction in the Court of Federal Claims over an action for breach of implied contract with the FCC. In *Folden v. United States*, 379 F.3d 1344 (Fed. Cir. 2004), the Federal Circuit affirmed the dismissal for lack of subject matter jurisdiction of plaintiff's claimed breach of an implied contract and a taking following the FCC's decision not to award a cellular communication license by lottery. The Federal Circuit held that 47 U.S.C. § 402(b) "reserves judicial review of Commission licensing decisions exclusively for the D.C. Circuit." 379 F.3d at 1353. See also *Minn. Christian Broadcasters, Inc. v. FCC*, 366 U.S. App. D.C. 307, 411 F.3d 283 (D.C. Cir. 2005) (deferring to FCC's determination on whether applicant was entitled to new entrant credit).

The Federal Circuit's broad application of the Communications Act and Congressional prerogative in this regard, is binding and dictates the outcome in this case. In *Folden*, the FCC changed the method of awarding licenses, and applicants already in the queue including Folden asserted an implied contract right to have license decisions decided under the rules in effect when they paid their fees.

Previously, the FCC awarded cellular licenses by comparative hearings. In 1981, Congress authorized a system of random selection or lotteries. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, ch. 2, 1242, 95 Stat. 357, 736-37 (1981) (codified at 47 U.S.C. § 309(i)). As explained in *Folden*, the FCC did

not implement a lottery system. 379 F.3d at 1347. Congress reacted by passing a revised lottery statute requiring implementing rules within 180 days. Lottery rules were implemented in 1984. A tentative awardee would be selected randomly with sequentially ranked alternates. The awardee would then undergo qualification-rigor and if the tentative selectee did not qualify, examination would proceed to the next named alternate, and so on until a qualified applicant was found.

> In 1988, the [FCC] amended [its procedure]. Under the amended regulations, after the tentative selectee was named, each remaining applicant was no longer to be randomly selected and ranked in order of selection. Rather, in accordance with the amended version of 47 C.F.R. § 1.823(a), the Chief of the Common Carrier Bureau and the Managing Director of the Commission were to determine, on a case-by-case basis, the number of remaining applicants to be selected, and thus ranked as alternative selectees, in each lottery.

379 F.3d at 1348 (citation omitted).

In 1988, the *Folden* plaintiffs applied for cellular licenses and paid required filing fees. Subsequent lottery notices stated that if an awardee did not become qualified, another lottery would be held among those remaining. Relotteries were held. None of the plaintiffs were successful. Awardees were successively disqualified and no licenses were granted.

While plaintiffs' applications were still pending, Congress added subsection 309(j) to the

Communications Act of 1934 which authorized the FCC to use auctions as the method of selecting licensees among competing applicants. Lotteries could be used with applicants who had filed prior to 1993 which included the *Folden* plaintiffs. Objections were made to the continued use of lotteries among the pre-existing applicants. The lotteries were postponed. Congress then prohibited lotteries in the relevant situations and Folden's applications were dismissed.

Plaintiffs then filed a class action complaint in the Court of Federal Claims, asserting breach of implied-in-fact contracts, takings in violation of the Fifth Amendment and an unconstitutional taking of their contract rights. In dismissing the implied contract claim, the Court of Federal Claims determined that "'the long tradition of Commission authority to change rules effectively precluded the FCC from making a contractual promise to the plaintiffs.'" 379 F.3d at 1353 (citing *Folden v. United States*, 56 Fed. Cl. 43, 55 (2003)). The trial court concluded that 47 U.S.C. § 402(b) assigned exclusive jurisdiction over FCC licensing decisions to the D.C. Circuit Court of Appeals and, that Section 402(b) extends that exclusivity to FCC decisions that are "'ancillary' to the nine types of licensing decisions expressly enumerated therein." 379 F.3d at 1354 (citing 56 Fed. Cl. at 56-57).

In *Folden*, plaintiffs argued "that because they were seeking money damages, the D.C. Circuit could not have had, and the Court of Federal Claims did have, jurisdiction over their claims." *Id.* Affirming the dismissal of the implied-in-fact contract claims, the trial court found that "plaintiffs' attempt to circumvent established agency and federal court procedures 'conjured a contract theory from the mere chance to

obtain a cellular license following submission of their applications' in the absence of any contract negotiations and documents." *Id.* The Federal Circuit rejected the contentions that jurisdiction between the two forums could coexist, and that the D.C. Circuit could not award money damages, as "explicitly rejected in *City of Rochester [v. Bond]*, 195 U.S. App. D.C. 345, 603 F.2d 927 [D.C. Cir. 1979]." 379 F.3d at 1358. Plaintiff's argument that the D.C. Circuit lacks jurisdiction over claims against the United States in excess of $ 10,000 (citing authorities other than the Federal Circuit) was addressed and rejected in *Folden*.

Folden concluded that regardless of the characterization of the grievances stated, they fell within the exclusive jurisdictional grant to the D.C. Circuit. "We think it clear that the D. C. Circuit's jurisdiction over claims that fall within subsection 402(b) is exclusive." 379 F.3d at 1356-57 (citing authorities including *City of Rochester*, 603 F.2d at 932-35 ("'In § 402 of the Communications Act . . . Congress has, we think, prescribed the exclusive mode of judicial review of such controversies as this . . . . '") (alteration in original)). "We have explained that 'when such a "specific and comprehensive scheme for administrative and judicial review" [as is in the Communications Act] is provided by Congress, the Court of Federal Claims' Tucker Act jurisdiction over the subject matter covered by the scheme is preempted.'" *Id.* at 1357 (extensive citations omitted).

Concluding that the D.C. Circuit would have exclusive jurisdiction if the Communications Act applied, the Federal Circuit then addressed that statute, particularly subsection 402(b). The Federal Circuit recognized that the FCC's decision not to hold

relotteries was not "strictly speaking" a denial of a licensing application, the statutory term, thus did not fall within the literal language of subsection 402(b)(1) (providing for jurisdiction in the D. C. Circuit of cases by "any applicant . . . whose application is denied"). Nevertheless, *Folden* held the exclusive jurisdiction of the Communications Act extended to "licensing decisions of the Commission that are 'ancillary' to those set forth in subsections (1)-(9)." *Id.* at 1359. Addressing plaintiff's claim for contractual breach, for which plaintiffs sought an aggregate of $ 144 million in damages, the fair market value of the licenses, 56 Fed. Cl. at 43, the Federal Circuit instructed: "[w]e have already held, however, that if subsection 402(b) applies in this case, it preempts Tucker Act jurisdiction. In analyzing whether subsection 402(b) applies, we must look to the true nature of plaintiffs' claim, not how plaintiffs characterize it. **At root, plaintiffs' action plainly represents a challenge to the Commission's failure to hold relotteries**. . . It is on those terms that we approach the question whether subsection 402(b) applies to it." 379 F.3d at 1359 n.13 (emphasis supplied).

Review of decisions ancillary to the FCC's licensing decisions and litigation that at its "root" is a grievance against an FCC licensing determination must be brought in the D.C. Circuit, the Federal Circuit stated. "[T]he Senate Report explained in 1951, '[t]he language of this subsection [402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of **all cases involving the exercise of the Commission's radio licensing power** is limited to that court [the D.C. Circuit].'" *Id.* at 1360-61 (emphasis and alteration in original) (citation omitted). *See Sprint Comme'n Co. v. FCC*, 348 U.S. App. D.C. 266, 274 F.3d

549, 552 (D.C. Cir. 2007) (concluding D.C. Circuit has exclusive jurisdiction); *Sykes v. Jenny Wren Co.*, 78 F.2d 729, 732, 3 F.C.C. 764 (D.C. Cir. 1935) (finding licensee was "aggrieved" and "interests" "adversely affected" by order of the FCC expanding competitor's coverage area; accordingly exclusive jurisdiction was in the D.C. Circuit).

Plaintiff states that if the undersigned finds *Folden* applies, it will seek *en banc* rehearing of that decision by the Federal Circuit. After careful consideration, the court concludes *Folden* is controlling. [11]

Plaintiff directly contests the FCC's decision to award the license to Liberty and deny plaintiff's mutually exclusive application, thus squarely falling into section 402(b)(6), as an action by a "person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) [the application denied provision], (2), (3), (4), and (9) of this subsection." In comparison, in *Folden*, the Federal Circuit expanded the statute's enumerated agency acts to "ancillary" decisions. Neither the requested monetary relief, nor the breach of implied contract theory proffered, alter the underlying gravamen of the action. As *Folden* instructs, if the dispute falls within the terms of the statute, exclusive jurisdiction lies in the D. C. Circuit Court of Appeals. Lacking subject matter jurisdiction, this case must be dismissed.

Motion for Summary Judgment

In its alternative motion for summary judgment, defendant argues that as the D.C. Circuit rejected plaintiff's assertion that Liberty should have been disqualified as a bidder, this court should likewise

reject plaintiff's advancement of the same point, albeit in a contractual context, under *res judicata*, issue preclusion and/or collateral estoppel.

Plaintiff counters that the two cases involve different factual issues, different standards of construction and review, and different jurisdictional statutes. The question in *Biltmore Forest*, it is asserted, was whether the license granted was in the "public interest, convenience and necessity." 47 U.S.C. § 307(a). The question here is whether the FCC breached the auction terms.

Any jurisdiction in this court would be as a bid protest and the agency decision subject to review for arbitrariness and capriciousness

Plaintiff's Complaint asserts this court has jurisdiction under 28 U.S.C. § 1491(a)(1). [12] The Court of Federal Claims has subject matter jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, **or upon any express or implied contract with the United States.**" 28 U.S.C. § 1491(a)(1) (emphasis supplied).

It is concluded, in the alternative, that if the Court of Federal Claims has subject matter jurisdiction, summary dismissal as a matter of law is appropriate. Putting aside the *Folden* decision, plaintiff has pled a garden variety protest to the award of a construction permit to Liberty. [13] Plaintiff does not seek to invalidate the award, relief which, if granted, could well create a direct conflict with jurisdiction expressly afforded to the D.C. Circuit. While plaintiff invokes Section 1491(a)(1), which grants jurisdiction to the Court of Federal Claims "to render judgment upon any claim

against the United States founded . . . upon . . . any express or implied contract with the United States . . . ," Section 1491(b)(1) which grants jurisdiction "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids . . . or the award of a contract," comprises the correct source for any jurisdiction which would exist to grant relief with respect to the claim pleaded. [14]

Plaintiff is objecting to the auction award to Liberty. Under similar facts, in *Prineville Sawmill Co. v. United States*, 859 F.2d 905 (Fed. Cir. 1988), the Forest Service announced plans to sell salvage timber by auction. Confirming that the government invitation for bids to sell a government commodity carried with it an implied contractual obligation to fairly and honestly consider all bids, for breach of duty, the Federal Circuit, applied bid protest standards under then Section 1491(a)(3), measuring government action under the arbitrary and capricious standard. 859 F.2d at 909-15.

Under the Tucker Act, protests must be brought by "interested parties." 28 U.S.C. § 1491(b)(1). Standing, construed in accordance with the Competition in Contracting Act, is limited to "'an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.'" *Am. Fed'n of Gov't Employees v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) (citing 31 U.S.C. § 3551(2)). Accordingly, plaintiff must establish that it "(1) is an actual or prospective bidder, and (2) possesses the requisite direct economic interest." *Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006).

To establish that it has a "direct economic interest," plaintiff must show that it had a "substantial chance" of receiving the contract. *Id.* at 1307. *See Myers Investigative & Sec. Servs., Inc. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002) (citing *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334 (Fed. Cir. 2001)). Plaintiff bears the burden of establishing standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Additionally, a protestor must also show that any alleged errors caused prejudice. *Galen Med. Assocs. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it." (quoting *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996)); *Textron, Inc. v. United States*, 74 Fed. Cl. 277, 283 (2006) ("[A] successful protestor must also establish that the errors complained of caused prejudice."). Therefore, "prejudice (or injury) is a necessary element of standing." *Myers*, 275 F.3d at 1370.

Plaintiff satisfies the "interested party" requirement under section 1491(b)(1). First, it is undisputed that plaintiff was an actual (the second-highest) bidder. *Rex Serv.*, 448 F.3d at 1307. Secondly, the FCC's decision to declare Liberty the winner and licensee, and deny plaintiff's application, directly affects plaintiff's economic interests as alleged in this Complaint. *Info. Scis. Corp. v. United States*, 73 Fed. Cl. 70, 94 (2006). Plaintiff would "no doubt benefit from receiving the award." *Hamilton Sundstrand Power Sys. v. United States*, 75 Fed. Cl. 512, 515 (2007). Therefore, plaintiff

has stated sufficient economic interest for standing. *Rex Serv.*, 448 F.3d at 1307.

Plaintiff is an unsuccessful bidder. Prior to 1970, an unsuccessful bidder generally did not have standing to challenge an award of a government contract. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869, 84 L. Ed. 1108 (1940); *Edelman v. Federal Housing Admin.*, 382 F.2d 594, 597 (2nd Cir.1967). The reasoning was that the statutes and regulations governing the contract awards were intended to protect only the government, not bidders. *Id.*

In *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859 (D.C. Cir. 1970), the court held that under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982), a disappointed bidder had standing to challenge the award of a government contract. The court stated that unsuccessful bidders "are the people who will really have the incentive to bring suit" to compel "agencies [to] follow the regulations which control government contracting" and that "[t]he public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity . . . ." *Id.* at 864.

The jurisdiction first asserted by the Court of Claims over suits challenging a contract award for alleged impropriety in the contracting process, rested upon the Tucker Act grant of jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a) (1982). Improprieties may violate "an implied contract to have the involved bids fairly and honestly

considered." *United States v. John C. Grimberg Co.*, 702 F.2d 1362, 1367 (Fed. Cir. 1983). In *Grimberg*, the Federal Circuit referred to *Keco Industries, Inc. v. United States*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970), which recognized an unsuccessful bidder's standing.

Keco explained that "as a result of *Scanwell*, a party, who can make a prima facie showing of arbitrary and capricious action on the part of the Government in the handling of a bid situation, does have standing to sue . . . . [E]very bidder has the right to have his bid honestly considered by the Government, and if this obligation is breached, then the injured party has the right to come into court to try and prove his cause of action." *Keco*, 192 Ct. Cl. at 779-80. "[B]y the solicitation for bids, the Government impliedly promised that it would give honest and fair consideration to all bids received and would not reject any of them arbitrarily or capriciously, but would award the contract to that bidder whose bid in its honest judgment was most advantageous to the Government." *Heyer Products Co. v. United States*, 147 Ct. Cl. 256, 258, 177 F. Supp. 251, 252 (1959); *see also B.K. Instrument, Inc. v. United States*, 715 F.2d 713 (2d Cir. 1983); *Heyer Products Co. v. United States*, 135 Ct. Cl. 63, 71, 140 F. Supp. 409, 413-14 (1956).

In Section 133(a) of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 39-40 (1982), Congress amended the Tucker Act to give the Claims Court authority to grant injunctive relief:

> (3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable

> and extraordinary relief as it deems proper, including but not limited to injunctive relief.

The legislative history of this provision shows that Congress intended the Claims Court to have the same authority over pre-award bid protests, *Grimberg*, 702 F.2d at 1369, that the district courts had under *Scanwell*. The Senate Committee Report explained:

> By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process, the Committee does not intend to alter the current state of the substantive law in this area. Specifically, the *Scanwell* doctrine as enunciated by the D.C. Circuit Court of Appeals in 1970 is left in tact [sic]. *See Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859 (D.C. Cir. 1970).

S. Rep. No. 97-275, 1st Sess., at 23, *as reprinted in* 1982 U.S.C.C.A.N. 11, 33.

Similarly, the House Committee Report stated: "[i]t is not the intent of the Committee to change existing caselaw as to the ability of parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action. *See, e.g., Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859 (D.C. Cir. 1970)." H.R. Rep. No. 97-312, 1st Sess., at 43 (1981).

The essence of "the *Scanwell* doctrine," which Congress intended 28 U.S.C. § 1491(a)(3) to make applicable to the Claims Court, is that an unsuccessful bidder has standing to challenge a proposed contract award on the

ground that in awarding the contract the government violated statutory and procedural requirements. *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1572-74 (Fed Cir. 1983).

While jurisdiction over protests by unsuccessful bidders was established, damages were limited to bid preparation costs. *Heyer Products* acknowledged that unsuccessful bidders could not recover lost profits, but could recover bid preparation costs. "It was an implied condition of the request for offers that each of them would be honestly considered . . . . This implied contract has been broken, and plaintiff may maintain an action for damages for its breach." 135 Ct. Cl. at 69-70, 140 F. Supp. at 412-13. However, " [a]n unsuccessful bidder cannot recover the profit he would have made out of the contract." 135 Ct. Cl. at 69, 140 F. Supp. at 412.

The enactment of the Administrative Dispute Resolution Act of 1966, Pub. L. No. 104-320, 110 Stat. 3870 (1996) ("ADRA"), further amended the Tucker Act, enlarging the Court of Federal Claims' jurisdiction over bid protests to post-award matters, and extending the court's equitable powers. *See* 28 U.S.C. § 1491(b). The limitation of any monetary relief to "bid preparation and proposal costs" was maintained. Section 1491(b)(2). Federal district court jurisdiction over bid protests was terminated as of January 1, 2001. *See* Pub. L. No. 104-320 § 12(d), 110 Stat. at 3875; *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001). Accordingly, after January 1, 2001, the Court of Federal Claims provides the sole judicial forum for bid protest litigation.

With the enactment of ADRA, it was no longer necessary for an unsuccessful bidder to base the court's

protest jurisdiction on a breach of an implied contract to consider bids fairly, but the statute enables a protestor to challenge arbitrary and capricious conduct in the context of a contract award--the same cause of action previously considered under the rubric of a breach of an implied contract. *See L-3 Commc'ns Integrated Sys. v. United States*, 79 Fed. Cl. 453 (2007). *L-3 Communications* was brought by an unsuccessful bidder alleging the Air Force breached its contractual obligation to fairly consider its offer because the selection process was manipulated and tainted by misdeeds of a high-ranking government official. Allegations included bad faith, favoritism and bias. As the court explained:

> Before enactment of the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996) (ADRA), the Court of Federal Claims' jurisdiction over a bid protest was predicated on the implied contract between the Government and prospective bidders to treat the bidder's proposal fairly, equally, and consistently with the agency's solicitation of bids . . . . Although ADRA obviated the need to base the COFC's protest *jurisdiction* on a breach of this implied-in-fact contract to consider bids fairly, the statute in no way eliminated a protestor's ability to challenge arbitrary and capricious conduct, such as bias or an unfair evaluation, which would also constitute a breach of the implied contract of fair dealing. Section 1491(b) expressly provides that this Court has jurisdiction over 'an action by an interested party objecting . . . to the award of a contract.' The statute does not limit the legal theories on

> which such an 'objection' to a contract award might be based. Whether conduct be characterized as an arbitrary and capricious agency action or a breach of the implied duty to consider proposals fairly, such conduct is actionable in a bid protest.

79 Fed. Cl. at 461-62 (extensive citations omitted). [15]

The D.C. Circuit determined the FCC did not act arbitrarily or capriciously

The FCC's decisions challenged here have already been adjudicated in *Biltmore Forest* as not arbitrary or capricious, the applicable standard. *Prineville Sawmill Co. v. United States*, 859 F.2d 905, 909 (Fed. Cir. 1988) (stating the review of an agency's bid solicitation decisions is narrowly construed and the standard is arbitrary and capricious action). The D.C. Circuit's finding that the FCC's actions were not arbitrary or capricious, followed extensive venting, including arguments concerning Liberty's failure to file its family media certification. Those findings bind this court. The parties are identical or in privity; the first suit proceeded to a final judgment on the merits; and thirdly, the second claim (the instant litigation) is based on the same set of transactional facts as the first. *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003). The D.C. Circuit concluded the FCC did not act arbitrarily or capriciously in concluding Liberty could file a family media certification after the deadline, and granting Liberty's application while denying plaintiff's competing one. Assuming jurisdiction here, the same question would be asked and the response would be the same.

In *Nevada v. United States*, the Supreme Court summarized *res judicata*:

> Simply put, the doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' The final 'judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.'

463 U.S. 110, 129-30, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983) (alteration in original) (citations omitted).

The Federal Circuit has defined "claim preclusion" (a term that, along with " issue preclusion") is used interchangeably with *res judicata*: "[W]hen a judgment is rendered in favor of a party to litigation, the plaintiff may not thereafter maintain another action on the same 'claim,' and defenses that were raised or *could have been* raised by the defendant in that action are extinguished.'" *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 478 (Fed. Cir. 1991).

As the Federal Circuit explained, "[t]he doctrine of *res judicata*, in its claim preclusion form, provides that final judgment on a claim extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."

Hornback v. United States, 405 F.3d 999, 1001 (Fed. Cir. 2005) (citations and internal quotation marks omitted).

Issue preclusion, or collateral estoppel. "bars litigation of an issue if an identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented." *Simmons v. Small Business Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2007), *cert. denied*, 128 S. Ct. 361, 169 L. Ed. 2d 89 (2007).

That an issue be "actually litigated" is "generally satisfied if the parties to the original action disputed the issue and the trier of fact decided it." *In re Freeman*, 30 F.3d 1459, 1466 (Fed. Cir. 1994). The requirement that the party had a "full and fair opportunity to litigate," 30 F.3d at 1465, is satisfied if there is no reason to "doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation." 30 F.3d at 1467 (citing *Montana v. United States*, 440 U.S. 147, 164, 99 S. Ct. 970, 59 L. Ed. 2d 210 & n.11 (1979)).

In *Biltmore Forest*, Biltmore argued that the FCC should have disqualified Liberty, awarded the license to Biltmore and not dismissed Biltmore's application, for several reasons, including the untimely filing of the family media certification. In response, the D.C. Circuit held that "the family [media] certification [was] not among those required pursuant to [47 C.F.R.] § 1.2105, the omission of which incurably disqualifies the applicant as specified in § 1.2105(b)(1)." 321 F.3d at 160-61. The D.C. Circuit further held that it was not unreasonable for the FCC to extend to Liberty the opportunity to correct its filing defect pursuant to

Section 1.2105(b)(2). Accordingly, the D.C. Circuit affirmed the FCC's decision to award the license to Liberty.

That the first action was a review of the FCC's licensing decisions and this subsequent suit for breach of contract is of no moment. The underlying facts, particularly the family media certificate requirements in the Public Notice, are the same. Plaintiff repeats the same argument, that the FCC breached an implied-in-fact contract when it did not disqualify Liberty for failure to file its family media certification. This issue was actually litigated and decided by the D.C. Circuit; substantive resolution of that issue was part of the D.C. Circuit's decision to affirm the FCC's determination. 321 F.3d at 155. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

In *Aulston v. United States*, 823 F.2d 510 (Fed. Cir. 1987), the Interior Board of Land Appeals determined that the plaintiff had no ownership rights in the property. As the title question was decided against plaintiff in an adjudicative administrative procedure, that finding was binding on the Court of Federal Claims in a subsequent takings case. Confirming this court has jurisdiction over the taking claim, the administrative findings on lack of title could not be ignored. "'[T]he Claims Court does not acquire authority to review an agency action otherwise reviewable only in district court merely because plaintiff's effort to obtain review is couched in terms of a taking claim.'" 823 F.2d at 514.

Accordingly, if this court has jurisdiction over plaintiff's pleaded claim, defendant's alternative motion for summary judgment presents a valid argument because, as a matter of law, plaintiff's claims are barred by *res judicata*, collateral estoppel and issue preclusion.

Finally, if this court has subject matter jurisdiction over plaintiff's claims, and if the issues sought to be raised here were not barred by *res judicata*, issue preclusion or collateral estoppel, any monetary recovery would be limited to bid preparation and proposal costs, not the lost profits specifically plead. 28 U.S.C. § 1491(b)(2) ("To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.").

Accordingly, it is **ORDERED** that:

1. Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, Motion for Summary Judgment, is **GRANTED**.

2. The Clerk is directed to enter final judgment dismissing plaintiff's Complaint with no costs assessed.

s/ James F. Merow

James F. Merow

Senior Judge

Footnotes

1 Although not owned by the federal government, since 1927, electromagnetic radio spectrum has been federally regulated, because "[w]ithout government control, the medium would be of little use because of

the cacophony of competing voices, none of which could be clearly and predictably heard." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375-76, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969).

2 The Public Notice is Attachment A to the Complaint.

3 For reasons of economic competition and diversity in granting licenses, the FCC considers any media interests held by members of an applicant's family. *See generally* 47 C.F.R. § 73.3555 (2007).

4 Under certain circumstances, bidders with limited or no broadcast experience were entitled to a bidding credit of up to 35 percent of their bid.

5 Although the FCC had discretion in this regard, minimum bid increments were ten percent. 14 F.C.C.R. at 10663. Illustratively, Liberty's winning bid was $ 2,336,000; plaintiff's was $ 1,518,400. *In re Liberty Prods.*, 16 F.C.C.R. 12061, 12065 (adopted April 12, 2001; released May 25, 2001).

6 Some facts were taken from *Biltmore Forest*, discussed *infra*.

7 Qualification issues were raised by motions to enlarge before the FCC filed by plaintiff and other applicants. In briefing before the D.C. Circuit, plaintiff stated the family media certification was not a "mere technicality. In fact, it turned out that the wife of Liberty's 65% limited partner owns a large interest in a nearby market . . . . [T]he FCC came up with a novel interpretation of its new way of calculating attributable ownership percentages that resulted in the limited

partner's interest being treated as smaller than the 33% threshold." 2002 WL 335537, at *18 n.9.

8 When applications for this license were initially filed in 1987, the FCC's practice was to hold comparative hearings to resolve any issues relating to the applicants and determine which of the remaining qualified applicants would best serve the public interest. *Biltmore Forest*, 321 F.3d at 156. In 1997, before final determinations had been made, due to intervening statutory changes, the FCC adopted competitive bidding auction procedures. Pub. L. 105-33, § 3002, 111 Stat. 251, 258-60 (1997) (codified at 47 U.S.C. § 309(j) (2000)).

9 28 U.S.C. § 2342 provides in relevant part: "[t]he courts of appeals (other than the United States Court of Appeals for the Federal Circuit) has [sic] exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--(1) all final orders of [the FCC] made reviewable by section 402(a) of title 47[.]"

10 As discussed in *Biltmore Forest*, deficient or incomplete applications fall into two categories--one curable--one not. Failure to submit certain certifications is not curable and dismissal is required. 47 C.F.R. § 1.2105(b)(1) provides:

> *(b) Modification and Dismissal of Short-Form Application (FCC Form 175).* (1) Any short-form application . . . that does not contain all of the certifications **required pursuant to this section** is unacceptable for filing and cannot be corrected subsequent to the applicable filing

> deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

The FCC has some discretion under section 1.2105(b)(2) to allow other types of defects in applications to be cured. "The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application." Minor amendments or modifications "include, but are not limited to, the correction of typographical errors and other defects not identified as major." 47 C.F.R. § 1.2105(b)(2). Major amendments include changes in ownership or size of the applicant or in the proposed service area. *Id.*

The parenthetical exception in subsection (b)(2) taking "failure to . . . make certifications" out of the class of curable defects under that subsection, does not apply to the family certification, the FCC reasoned, because the "certifications" in question are only those implicated in subsection (b)(1), namely "the certifications required pursuant to" Section 1.2105. Those certifications are that the applicant is: (1) "legally, technically, financially and otherwise qualified" under the Communications Act; (2) in compliance with foreign ownership provisions; (3) willing to comply with service-specific qualifications; (4) has not entered any bid deals; and (5) is not in default of any agency obligation or non-tax debt. Because the family media certification was required by the July 9 Public Notice rather than by Section 1.2105(a) (incurable disqualification), the D.C. Circuit did not find the FCC's exercise of discretion to allow Liberty to cure to be arbitrary and capricious.

11 Plaintiff's cited cases are distinguishable. None concern the Communications Act. *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) concerned contracts with the Federal Home Loan Bank Board over regulatory accounting. *Mobil Oil Exploration & Producing Se., Inc. v. United States*,.530 U.S. 604, 120 S. Ct. 2423, 147 L. Ed. 2d 528 (2000) involved offshore leases. In *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F.2d 35 (D.C. Cir. 1955), the second-highest bidder in an auction by the Secretary of the Interior of oil and gas rights on public land successfully contested the highest bidder's application as defective under the public notice. An Interior Department auction was also the subject of the litigation in *Superior Oil Co. v. Udall*, 133 U.S. App. D.C. 198, 409 F.2d 1115 (D.C. Cir. 1969). Actions by the Federal Energy Regulatory Commission were addressed in *Wisconsin Valley Improvement Co. v. FERC*, 344 U.S. App. D.C. 371, 236 F.3d 738 (D.C. Cir. 2001) and *Transmission Access Policy Study Group v. FERC*, 343 U.S. App. D.C. 151, 225 F.3d 667, 670 (D.C. Cir. 2000). In *Bell Atlantic Telephone Cos. v. FCC*, 306 U.S. App. D.C. 333, 24 F.3d 1441 (D.C. Cir. 1994), the D.C. Circuit invalidated an FCC order requiring local telephone exchange companies to set aside a portion of their central offices for use by competitive access providers. Agreeing that the FCC did not have authority to require co-location, the court addressed petitioners' alternate argument that such an imposition would constitute a taking. Takings claims were noted as a matter within the exclusive jurisdiction of the Court of Federal Claims. 24 F.3d at 1444, n.1 (citing 28 U.S.C. § 1491(a)(1)). In that context, the *Bell Atlantic* court commented that any taking claim must be brought in the Court of Federal Claims: "the *Tucker Act* remedy is

presumed available unless Congress had explicitly foreclosed it by another enactment, and nothing in the Communications Act does so." Finding that the FCC orders were not authorized, the requisite for a taking was not present, the D.C. Circuit's comment is dicta as to a taking claim (and plaintiff here seeks monetary damages for breach) and does not alter the conclusions reached herein.

12 Alleged jurisdictional sources also cited are 28 U.S.C. §§ 2071(a) and (c) (general rule-making authority); 2503(b) (proceedings generally); and 2521(1) (subpoena power).

13 Government auctions are contractual. *See Barclay v. United States*, 166 Ct. Cl. 421, 435-37, 333 F.2d 847, 856-57 (1964); *Koby v. United States*, 47 Fed. Cl. 99, 102 (2000). *See Swanson Group, Inc. v. United States*, 76 Fed. Cl. 44, 51 (2007) (finding breach of terms of auction contract between government and successful bidder); *Rivera Agredano v. United States*, 70 Fed. Cl. 564, 571-575 (2006) (construing terms of government auction as contract); *Rodriguez v. United States*, 69 Fed. Cl. 487, 491-500 (2006) (same); *Commodities Recovery Corp. v. United States*, 34 Fed. Cl. 282, 290-91 (1995) (cited by the FCC in the case *In re BDPCS, Inc.*, 15 FCC Rcd 17590, at 17600, 2000 WL 942977, at *13, n.63 (July 11, 2000) (same); *United States v. Weisbrod*, 202 F.2d 629, 631-32 (7th Cir. 1953) (same).

14 *Folden* does not address any source of subject matter jurisdiction absent the Communications Act. Plaintiffs in *Folden* alleged subject matter jurisdiction under Section 1491(a)(1). 379 F.3d at 1354. Neither the trial court nor the Federal Circuit ruled on that

reliance. Also, in *Folden*, the FCC conducted lotteries, not auctions.

15 As noted in *L-3 Communications*, "[t]he Federal Circuit has not had occasion to address whether the implied contract theory survives the Administrative Dispute Resolution Act." 79 Fed. Cl. at 461 n.16. *See Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1083 n.9 (Fed. Cir. 2001) ("Similar to the *Impresa* court, 238 F.3d at 1332 n.6, we decline to address whether implied contract theory survives the ADRA."); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 n.6 (Fed. Cir. 2001) (noting that "we need not decide" whether the implied contract theory survived the 1996 amendments to the Tucker Act).

2008-5055

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BILTMORE FOREST BROADCASTING FM, INC.,
Plaintiff-Appellant,
v.
UNITED STATES,
Defendant-Appellee.

Filed 4/20/2009

Appeal from the United States Court of Federal Claims in 07-CV-316, Senior Judge James F. Merow.

ORDER

A petition for rehearing en bane having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en bans having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 27, 2009.

47 U.S.C. 402(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.
(8) By any radio operator whose license has been suspended by the Commission.
(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

28 U.S.C. 1491(a)(1)

(a)
(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.